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BEFORE THE

Federal Communications Commission

JUL - 8 1993

WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of

MM DOCKET NO. 93-42

MOONBEAM, INC.

)

File No. BPH-911115MG

)

GARY E. WILLSON

)

File No. BPH-911115MO

)

For a Construction Permit
New FM Station on Channel 265A
in Calistoga, California

)

)

)

TO: The Honorable Edward Luton
Administrative Law Judge

THIRD PETITION TO ENLARGE ISSUES

A. Wray Fitch III
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July 8, 1993

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

THIRD PETITION TO ENLARGE ISSUES

Gary E. Willson (Willson) pursuant to Rule 1.229 files this Third Petition to Enlarge Issues against Moonbeam, Inc. (Moonbeam). Willson seeks addition of a lack of candor/ misrepresentation issue for: misrepresentations made in deposition testimony by Mary Constant concerning her husband's involvement in her application for Calistoga; for misrepresentations in Moonbeam's application concerning the intended location of Moonbeam's main studio; for misrepresentations concerning Ms. Constant's civic activities; for misrepresentations concerning Ms. Constant's past local residence; for misrepresentations concerning Ms. Constant's involvement in businesses owned by her husband; and for Moonbeam's lack of candor in failing to report an existing broadcast interest of Fred Constant, the husband of Moonbeam's sole shareholder, Mary Constant. Willson also seeks addition of an ineptness/ carelessness issue.

A. Overview.

This petition is based on evidence adduced during the deposition of Mary Constant, held on June 4, 1993. This petition has been timely filed within 15 days of receipt of the deposition transcript which serves as the basis for the issues requested. During the course of the deposition, Mary Constant revealed for the first time that her husband is the 100 percent shareholder of a station in Ketchikan, Alaska. This crucial broadcast interest

Constant testified that she has had no discussions with her husband about her application and that, "My discussions about the application have all been with my attorney and with my engineer." Ex. 1, p. 98. Her husband, however, has at least in two instances been directly involved in his wife's application for Calistoga. He called Mr. Willson to discuss his wife's application, and he attended a meeting in Washington with Mary Constant to discuss the Calistoga proceeding.

Ms. Constant also falsely testified that she had no knowledge of any financial difficulties involving any of her husband's past media properties and, further, falsely testified that she had no involvement in her husband's businesses.

It also appears that, contrary to what is stated in its 301 application, Moonbeam intends to locate its main studios in Santa Rosa, outside the 3.16 mV contour in contravention of Commission rules. Moonbeam proposes to use KFTY-TV office space.

Moonbeam claims credit for the civic involvement of Mary Constant in the Calistoga Performing Arts Association (CPAA) in its March 2 amendment and again in its Integration and Diversification Statement. This was described as an ongoing involvement. It turns out, however, that the CPAA went defunct in the summer of 1992. See Ex. 1, p. 50.

These omissions and inaccuracies are not isolated events. In Willson's First Petition to Enlarge Issues, Willson notes that Mary Constant misrepresented the location of Sonoma State University where she claims she attended by claiming the college is located in Santa Rosa, within the 1 mV contour when, in fact,

it is located several miles outside the 1 mV contour in Rohnert Park. She also claimed to have resided within the 1 mV contour in an amendment filed March 2, 1992. Willson in his First Petition to Enlarge Issues pointed out that this claim too appeared to be a misrepresentation. In Moonbeam's opposition, while admitting that Sonoma State University was not within the 1 mV contour, Moonbeam evaded response to Willson's assertion that she never resided within the 1 mV contour. It now turns out she never did. During her deposition, Ms. Constant admitted she lived with her parents in Petaluma, California, outside the 1 mV contour from 1946 through 1969, during the time she earlier claimed she lived in Santa Rosa while attending Sonoma State University. Ex. 1, pp. 36-42 This pattern of inaccuracies, omissions, and misrepresentations also requires addition of an ineptness or a carelessness issue. See Merrimack Valley Broadcasting, Inc., 57 RR2d 713 (1984).

B. Misrepresentation/Lack of Candor.

Moonbeam has failed to report the 100 percent ownership of Mary Constant's spouse, Fred Constant, in Idaho Broadcasting Consortium, Inc. (IBC), the permittee of FM broadcast station KRMR-FM (formerly KYAA) in Ketchum, Idaho. IBC acquired the construction permit for KYAA from the former permittee, Jim Kincer. An assignment application was filed on August 7, 1992 (File No. BAPH-920807AF), approved by the FCC, and consummated on November 30, 1992. See Ex. 2.

The failure to report a spouse's broadcast interests is a material and significant omission.¹ This is especially true where the spouse, as does Mr. Constant, owns 100 percent of another FM station. The doctrine of spousal attribution for purposes of diversification in comparative broadcast proceedings firmly provides that the media interests of one spouse will be attributed to the other. Richard P. Bott, 4 FCC Rcd. 4924, 4926 (Rev. Bd. 1989). The Review Board in Bott further observed that, although the spousal attribution presumption is of "nearly conclusive stature" the presumption can be rebutted. The Board, however, noted it was aware of no cases where the presumption had been rebutted. Subsequent to the Bott decision, the Commission issued a Policy Statement on Spousal Attribution, 7 FCC Rcd. 1920 (released March 9, 1992) which eliminated the presumption of spousal attribution with respect to the Commission's multiple ownership and cross-ownership rules, although still applying a "less restrictive attribution standard." The Commission specifically noted that its spousal attribution presumption still applied within the context of comparative hearings, "Therefore,

¹ Rule 1.65 provides in pertinent part that applications shall be amended within 30 days, "whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects," or "whenever there has been a substantial change as to any other matter which may be of decisional significance in the Commission proceeding involving the pending application" The 301 application also requires disclosure of all broadcast interests of immediate family members. "Under existing policy, applicants for new construction permits and for transfers or assignments of licenses are required to report the broadcast interests of all immediate family members (parents, siblings and offspring, as well as spouses) of any party to the application." Policy Statement Regarding Spousal Attribution, 7 FCC Rcd. 1920 (released March 9, 1992).

the policies we adopt today are similarly restricted and do not address the application of spousal attribution in determining integration or diversification credit in the context of comparative hearings." Id. at n. 2.

Ms. Constant was adamant during deposition that her husband had no involvement in her application (i.e., that she does not and has not discussed her application with her husband). She was also quite evasive.² Ms. Constant testified falsely during her deposition. Her claim that her husband has had no involvement in her application is incredible on its face and is not true. On February 1, 1992, Mr. Constant called Mr. Willson to discuss the Moonbeam application, Willson's application, and the proceeding. See Ex. 3. Also, on October 26, 1992, Mr. Constant attended with

² Q: And have you discussed with your husband filing this application for Calistoga?

A: I've discussed it with my attorney.

Q: And you haven't discussed it with your husband?

A: We do live in the same house.

Q: Well, then the answer is --

A: I mean it's not -- we have not had big discussion about it, no.

Q: But have you had discussions about it?

A: We discuss a lot of things every day.

Q: You have had discussions about the Calistoga application?

A: We had discussions about a Calistoga radio station, not specifically a Calistoga application.

Q: So you haven't discussed your application?

A: My discussions about the application have all been with my attorney and with my engineer.

Q: So there have been none with your husband, then?

A: He is not part of my application.

Q: No, that's not the question. There have been no discussions with your husband about your application?

A: Not about the application itself, not about --

On redirect, Ms. Constant did state she may have had conversations with her husband about Mr. Livermore. See Ex. 1, pp. 97, 98, 111.

his wife Mary Constant a meeting in Washington with undersigned counsel and counsel for Moonbeam to discuss settlement options. Either instance represents a direct involvement by Mr. Constant in Moonbeam's application. There is a clear motive for Ms. Constant to misrepresent her husband's involvement in her application. As noted above, spousal involvement has a direct bearing on spousal attribution. Also, Ms. Constant has a motive to distance herself as much as possible from her husband to avoid a real-party-in-interest issue. This is especially true here where Mr. Constant has owned and operated many radio stations in the past, whereas Ms. Constant has no broadcast experience and has never owned any media interests.³

In a further effort to distance herself from her husband's media interests and businesses, Ms. Constant made additional misrepresentations during her deposition. She claims she had no involvement with MegaMedia, a company owned by her husband, and that she has no information concerning any financial difficulties involving her husband's stations. See Ex. 1, pp. 58,95. It turns out that not only does Ms. Constant have knowledge concerning the financial difficulties involving her husband's stations, but that she executed a declaration submitted to a Court in an effort to stop GlenFed, a station creditor, from foreclosing on personal assets. See Ex. 5. Ms. Constant also appears to have had some involvement in her husband's MegaMedia Company.

³ Fred Constant, through various corporate entities was the 100 percent owner of KIZN-AM, Boise; KIZN-FM, New Plymouth, Idaho; KWNZ-FM, Carson City and KQLO-AM, Reno, Nevada; KDUK-AM, Eugene and KLCX-FM, Florence, Oregon. See Ex. 4.

According to Elizabeth Ann Roper, a witness in a lawsuit in which MegaMedia and Fred Constant were named defendants, both Mary Constant and Fred Constant phoned the witness before trial in an effort to pressure her not to testify. See Ex. 6.

Moonbeam amended its application on March 2, 1992. It proposed a new transmitter site -- the KFTY-TV tower on Mount St. Helena. Moonbeam certified that its main studio would be within the protected 3.16 mV contour of its proposed station. See Ex. 7. It turns out, however, that Moonbeam intends to locate its main studio at the KFTY offices in Santa Rosa and that the engineering was amended to the KFTY site because of the availability of KFTY's offices. See Ex. 1, pp. 71,113. KFTY's offices are located within Santa Rosa, a considerable distance outside the proposed station's 3.16 mV contour. See Exs. 7 and 8. Moonbeam has misrepresented the intended location of its main studio thereby avoiding the need to seek a waiver of the Commission's main studio rule during the course of this comparative hearing.

A misrepresentation issue is warranted. The Commission is always concerned "with the broadcast applicant's propensity to be truthful in dealing with the Commission." San Joaquin Television Improvement Corp., 2 FCC Rcd. 7004, 7005, ¶8 (1987). The Commission. in Richardson Broadcast Group. 7 FCC Rcd. 1583 (1992)

willingness to deceive the Commission to gain a perceived advantage." Id. at ¶3.

The Commission has recently time and again expressed its concern regarding misrepresentations in cases involving even non-decisional matters. In Frank Digesu, 7 FCC Rcd. 5459 (1992), the Commission remanded the proceeding to explore whether one of the applicants had mischaracterized her past broadcast experience. See also, Gulf Breeze Broadcasting Company, ___ FCC Rcd. ___ (Rev. Bd. March 18, 1993). Indeed, the Commission has noted, "Although the Commission in some circumstances has shown leniency toward applicants that have been less than candid, more recently, 'the Commission's demand for absolute candor [has] itself [been] all but absolute.'" Emission de Radio Balmeseda, Inc., 7 FCC Rcd. 3852, 3588 (Rev. Bd. 1992) [other citations omitted]; Maria M. Ochoa, 7 FCC Rcd. 6569 (Rev. Bd. Oct. 13, 1992).

In Raymond J. and Jean-Marie Strong, 6 FCC Rcd. 5321 (Rev. Bd. 1991), the Review Board remanded and added a misrepresentation issue which had been denied by the ALJ. In that proceeding, an applicant made a false statement in an amendment concerning her employment. The applicant contended there was no intention to deceive in the amendment since she was not claiming any broadcast experience and that, therefore, there was no motive to dissemble as to her employment at another radio station. The Review Board added the issue, noting that, "The Court has admonished the Commission against avoiding a full evidentiary hearing 'when it is shown a good deal of smoke'" [citations omitted]. Id. at ¶9. See Weyburn Broadcasting Limited Partner-

ship v. FCC, No. 91-1383, 71 RR2d 1386 (DC Cir. 1993) (remanded to explore misrepresentation issues which should have been added).

C. Ineptness/Carelessness Issue.

An ineptness/carelessness issue is warranted based on a long series of omissions, misstatements, and misrepresentations by Moonbeam in this proceeding. These include:

- (1) The failure to report the acquisition by Mr. Constant of a construction of a new FM station in Ketchum, Idaho;
- (2) Misrepresenting the intended location of Moonbeam's main studio within the 3.16 mV contour of the proposed station;
- (3) Misrepresenting the location of Sonoma State University in Santa Rosa, California in order to obtain credit for past local residency when the University is located in Rohnert Park, a considerable distance outside the 1 mV contour;
- (4) Misrepresenting past local residence within Santa Rosa, California at a time when Ms. Constant resided in Petaluma, California, outside the 1 mV contour of the proposed station;
- (5) Claiming ongoing involvement in the Calistoga Performing Arts Association, when the organization had gone defunct nearly a year before the claim was made;
- (6) Misrepresenting the degree of involvement of Mr. Constant in the Moonbeam application;
- (7) Misrepresenting Mary Constant's involvement in her husband's affairs; and
- (8) Misrepresenting knowledge of any financial difficulties involving Mr. Constant's former broadcast stations.

D. Conclusion.

Willson respectfully requests that the following issues be added:

- (1) To determine whether Moonbeam and/or Mary

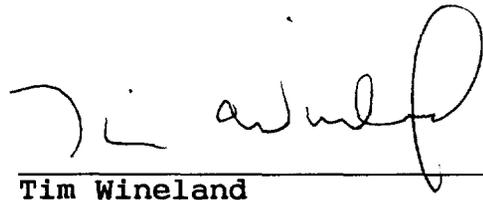
CERTIFICATE OF SERVICE

I, Tim Wineland, in the law offices of Gammon & Grange, hereby certify that I have sent, this 8th day of July 1993, by first-class, postage-prepaid, U.S. Mail, copies of the foregoing THIRD PETITION TO ENLARGE ISSUES to the following:

* The Honorable Edward Luton
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W., Room 225
Washington, D.C. 20554

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(Counsel for Moonbeam, Inc.)



Tim Wineland

* Hand Delivery

EXHIBIT 1

ORIGINAL

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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IN RE: APPLICATIONS OF	:
MOONBEAM, INC.	:
GARY E. WILLSON	:
	:
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Docket No. MM93-42
File No. BPH-911115MG
File No. BPH-911115MO

McLean, Virginia
Friday, June 4, 1993

Deposition of MARY CONSTANT, called for examination by
counsel for Gary Willson, pursuant to notice, at the offices
of A. Wray Fitch, Esq., Gammon & Grange, 8280 Greensboro
Drive, Seventh Floor, McLean, Virginia 22102-3807, before
Barbara E. Ingle, a Registered Professional Reporter and
notary public in and for the State of Virginia, beginning at
9:30 a.m., when were present on behalf of the respective
parties:

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FOR MOONBEAM, INC.:

LEE W. SHUBERT, ESQ. and SUSAN H. ROSENAU, ESQ.,
Haley, Bader & Potts, 4350 North Fairfax Drive,
Suite 900, Arlington, Virginia 22203-1633.

FOR GARY WILLSON:

A. WRAY FITCH III, ESQ. and JAMES A. GAMMON, ESQ.
Gammon & Grange, 8280 Greensboro Drive, Seventh
Floor, McLean, Virginia 22102-3807.

ALSO PRESENT:

Mr. Gary Willson.

1 BY MR. FITCH:

2 Q You have answered the question that this
3 information dealing with past local residency was, I presume,
4 equally true when you filed the original application as it
5 was at the time this amended application was filed; is that
6 correct?

7 A Yes.

8 Q My question is, and I go back to it because I need
9 to have the record clarified on it, is there a reason why the
10 enhancements claimed in your amended application were not
11 claimed earlier with respect to past local residency?

12 A In other words, you're asking me why I didn't claim
13 an enhancement because I was born in Petaluma, California, in
14 1946 in Sonoma County?

15 Q In your original application, that's right.

16 A No, there is no reason, other than I was born
17 someplace and I happened to have been born in Sonoma County
18 as were my parents and grandparents.

19 Q Let's talk about your former residency in Sonoma
20 County. You indicated you resided there from 1946 until
21 1969?

22 A That's true.

23 Q Where did you reside in Sonoma County?

1 A I resided mostly in Petaluma, California.

2 Q Mostly in Petaluma, California. Do you recall the
3 address where you lived in Petaluma?

4 A Yes. Well, I lived at different addresses there
5 with my parents.

6 Q What would those addresses be?

7 A From 1946 until about 1952 I lived on Ellis Street
8 in Petaluma, and from about 1952 until about 1960 I lived at
9 210 Gossage Way in Petaluma.

10 MR. SHUBERT: Would you spell Gossage for the
11 benefit of the court reporter?

12 THE WITNESS: G-o-s-s-a-g-e.

13 A And from 1960 until 1969 I lived at 102 Sunnyhill
14 Drive in Petaluma.

15 BY MR. FITCH:

16 Q All right. And during these years -- maybe the
17 simplest way to get at this is just to ask you when you were
18 born so we can calculate how old you were at the time you
19 resided at these addresses.

20 A I was born February 26, 1946 at Petaluma General
21 Hospital.

22 Q And at the time you were at each of these Petaluma
23 addresses you were living with your parents; is that correct?

1 A Since I was a full-time student my permanent
2 address was their address.

3 Q All right. Since you were a full-time student --
4 in 1946 you were not a student.

5 A No, I was a day old.

6 Q Correct.

7 A So until I was about six years -- five years old I
8 didn't go to school. I stayed with my mother.

9 Q Right. You were living with your parents.

10 A Yes, I was.

11 Q And then through 1969 you continued to reside with
12 your parents.

13 A Yes.

14 Q And during this period you went through the regular
15 schooling process through high school; is that correct?

16 A Yes.

17 Q Where did you attend schools?

18 A I attended Saint Vincent's Academy in Petaluma
19 until 1964, from 1st grade to 12th grade, through 12th grade.

20 Q When did you graduate from high school?

21 A I graduated from Saint Vincent's Academy in 1964.

22 Q And from the period '64 to '69 what did you do?

23 A From 1964 through 1966 I went to Sonoma State

1 University, and then from 1967 through half of 1969 I went to
2 San Jose State University. But I also took summer classes at
3 Sonoma State University throughout the whole period.

4 Q Throughout what whole period?

5 A In other words, when I was at -- even though when I
6 was at San Jose State University, during the summertime I
7 took classes at Sonoma State University.

8 Q Okay. How many classes did you take? Do you
9 remember?

10 A No.

11 Q During a typical summer.

12 A Well, a typical summer would probably be two
13 classes.

14 Q And do you recall how many credits you got for
15 those classes?

16 A No, I don't.

17 MR. SHUBERT: Objection to relevancy. I mean I
18 know -- you're talking about something 30 years ago. Are you
19 trying to dispute the fact that she lived there or went to
20 school there?

21 MR. FITCH: I'm trying to quantify the amount of
22 credit you're seeking to get for past local residency,
23 counsel.

1 MR. SHUBERT: But what does the number of credits
2 she has taken in college have to do with it?

3 MR. FITCH: Your client has claimed that she
4 attended classes at the university in Santa Rosa within the
5 one millivolt contour. I am trying to quantify --

6 MR. SHUBERT: And we have established that she went
7 to the university that she went to. How many credits she
8 took is irrelevant.

9 MR. FITCH: It has to do with the amount of time
10 she spent at the university.

11 MR. SHUBERT: If you want to spend the entire day
12 here asking about minutia, go right for it. Try to put it in
13 the record. Go ahead. You can waste the time. You're
14 paying by the page.

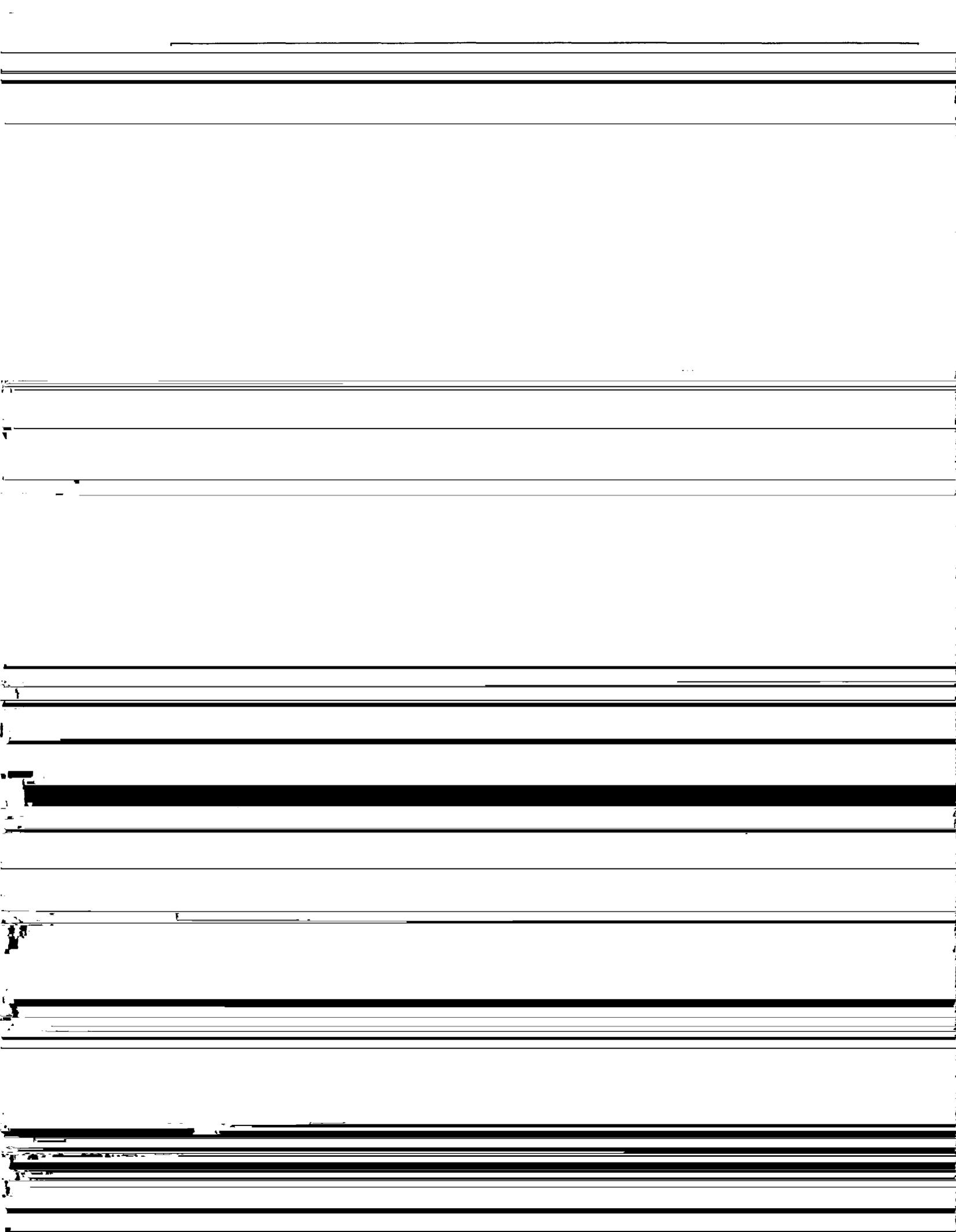
15 MR. FITCH: Thank you.

16 MR. SHUBERT: Do you want to know the courses? Do
17 you want the instructors? Do you want to know where the
18 courses met? Do you want to know the buildings that they
19 were in?

20 MR. FITCH: Yes, I may want to know the buildings
21 that they were in, as a matter of fact.

22 MR. SHUBERT: Fine.

23 MR. FITCH: Thank you.



1 A No.

2 Q You don't know if it is?

3 A It would be on the map. I don't think it is.

4 Q Let's take a look. I believe you've got amended
5 engineering, do you not? Yes. My map is chopped up, so can
6 you point out where Petaluma would be?

7 A I think it's probably like right in here somewhere.
8 Let's see, there's Penngrove. It's like right -- I think
9 Petaluma starts about right here.

10 MR. SHUBERT: Can we let the record reflect that
11 she is pointing to an area of the map that is beyond the 60
12 BBU contour.

13 MR. FITCH: I was just going to clarify that.

14 MR. SHUBERT: And it's almost due south of center
15 of the radials drawn on the map.

16 MR. FITCH: You'll stipulate to that?

17 MR. SHUBERT: Sure.

18 BY MR. FITCH:

19 Q Okay. Let's fold this up.

20 A Are you through?

21 Q Yes. You also reported in your integration
22 statement --

23 MR. SHUBERT: Can we show it to her again?

1 Q When did you join the Calistoga Performing Arts
2 Association?

3 A I joined that about -- I think it was January,
4 February, about the same time, 1992.

5 Q And describe for me your involvement with that
6 organization.

7 A Well, I was hoping to become very involved with
8 that organization, but unfortunately the performing arts has
9 folded. It's no longer in business.

10 Q When did it fold?

11 A Last summer. I got a letter from them last summer.

12 Q And you're also associated in some way with the
13 Native Daughters of the Golden West?

14 A No, I amended that. It's not the Native Daughters
15 of the Golden West; it's the Society of California Pioneers.

16 Q Is there an organization known as the Native
17 Daughters of the Golden West?

18 A Yes, there is, and in fact, you know, it was just a
19 slip of the tongue. My mother used to belong to the Native
20 Daughters of the Golden West, and when I was writing it out I
21 wrote Native Daughters instead of Society of California
22 Pioneers.

23 Q And do you know when you amended that? You say

1 Q Specific areas?

2 A In Napa and Sonoma.

3 Q Does your husband currently have any media
4 interests?

5 A Yes.

6 Q And what are those?

7 A It's in Idaho.

8 Q What is it? Describe the media interest.

9 A It's -- I think he owns a construction permit.

10 Q For --

11 A I think it's Ketchum, Idaho.

12 Q Is this for an FM station?

13 A Yes.

14 Q When was he awarded this construction permit?

15 A I don't know the date.

16 Q Is it recently?

17 A He bought the construction permit.

18 Q He bought it?

19 A He bought it. He didn't apply for it.

1 A Within the last year.

2 Q And is this station being built?

3 A I don't know. I don't know at what point in the
4 process he is right now.

5 Q And he has owned other stations in the past; is
6 that correct?

7 A In the past.

8 Q How long ago?

9 A Oh, it's been at least five years, I think. I
10 think it's been at least five years ago.

11 Q Okay.

12 A I couldn't give you the dates.

13 Q Do you know where those stations were located?

14 A The last station he owned was in Reno and Boise and
15 Eugene, Oregon.

16 Q Were you an owner with him of any of these
17 stations?

18 A No.

19 Q Were you an officer and director of any company
20 which owned or might have owned these stations?

21 A No.

22 Q Were you employed?

23 A No.